Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
	)	

REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

Mediacom Communications Corporation ("Mediacom") hereby submits its reply to comments filed in response to the Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding.[1] As described more fully below, Mediacom stands by its initial comments urging the Commission to close certain gaps in its "program access" rules, particularly with respect to how those rules are applied to buying groups and volume discounts. Mediacom also presents its rebuttal to those programmers who are opposed to any action by the Commission, no matter how modest, that would better effectuate the program access rules' pro-consumer and pro-competition objectives.

I. The Commission Should Undertake a Comprehensive Review of Discriminatory Practices in the Video Programming Marketplace.

When it comes to raising concerns about the discriminatory practices that are distorting today's video programming marketplace, no one has been more outspoken than Mediacom. Thus, it is not surprising that Mediacom supports the adoption of clarifications and modifications

[1] *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 77 Fed. Reg. 66052 (Oct. 31, 2012).

to the program access rules that will prevent programmers from discriminating against buying groups and their members. However, facilitating MVPDs' creation of and participation in buying groups is only a modest first step. The Commission can and should more directly address the adverse impact that unjustified "volume" discounts are having on competition and consumers.

In theory, volume discounts can be beneficial to competition and to consumers when based on legitimate and demonstrable cost savings. But the differential pricing practices occurring in today's video programming marketplace are not cost-based. Rather, they are a reflection of the programmers' ability to force smaller and medium-sized distributors – and their customers – to subsidize the largest distributors.

It is indisputable that the largest distributors pay less for programming than smaller and medium sized distributors, not because of any quantifiably demonstrable cost savings that the larger distributors provide, but because they have the leverage to get the best deals. And once the largest distributors have gotten their price, the programmers look to everyone else to make up the difference – not because it costs more to provide programming to those other distributors but because programmers have budgets to meet and the only way they can do so is by charging more to the distributors that lack the numbers to demand a better price. As Mediacom has previously shown, simply adjusting wholesale programming prices to eliminate volume-based discounts would provide significant savings to most consumers, at no cost to the programmers and only a minimal cost to the customers of the largest distributors.[2] Competition and investment would both benefit as well.

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[2] Mediacom has previously demonstrated how eliminating unjustified discounts would provide public benefits at little cost. *See* Comments of Mediacom Communications Corp., MB Docket No. 12-68 (filed June 22, 2012) at 12-13 ("*Mediacom June 2012 Comments*"). Based on published 2011 year-end industry-wide subscribership data, the weighted average monthly per subscriber rate paid under the rate schedule set forth below would be approximately

As evidenced by the record in the instant proceeding, there is a growing recognition that the video programming marketplace is headed down an unsustainable path. Several commenters have echoed Mediacom's calls for the Commission to take corrective action to protect competition and consumers. For example, Cox Communications Inc. ("Cox"), the nation's third largest cable operator, argues convincingly that the Commission needs to consider a "comprehensive solution" to the volume discount problem – one that would employ the Commission's broad authority under Section 628(b) of the Communications Act to prevent all programmers (not just those integrated with a cable operator) – from engaging in anticompetitive pricing practices.[3]

Mediacom agrees with Cox that the Commission must be more proactive in protecting competition and consumers. Mediacom also agrees with Cox that, while not a total solution, there are public interest benefits to be gained from facilitating distributors' use of buying groups.[4] The comments submitted in response to the Further Notice establish that Congress expected distributors to purchase programming through buying groups and intended for those groups to enjoy the full panoply of rights and protections afforded to individual distributors

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$0.385. If that rate was applied across the board to all MVPDs, the programmers would obtain the same level of revenues and the largest MVPDs would experience a per subscriber increase of around 1.5 cents. All of the remaining MVPDs would see a decrease in per subscriber costs ranging from around 2 cents to nearly 10 cents. Multiplied over a year's time and over dozens of cable networks, the savings to subscribers would be substantial, with little or no impact on larger MVPDs and programmers.

Size of MVPD (in subscribers)	Per-Subscriber Monthly Rate
10,000,001 or more	$0.370
5,000,001 to 10,000,000	$0.389
3,000,001 to 5,000,000	$0.408
1,000,001 to 3,000,000	$0.446
Under 1,000,000	$0.485

[3] Comments of Cox Communications, MB Docket No. 12-68 (filed December 14, 2012) at 2-6 ("*Cox Comments*"). *See also* Comments of Mediacom Communications Corp., MB Docket No. 12-68 (filed December 14, 2012) at 3-4, 14-15 ("*Mediacom December 2012 Comments*").

[4] *Mediacom December 2012 Comments* at 4.

under the program access rules.[5] However, the record also establishes that the Commission's implementation of the program access rules has left buying groups and their members exposed to programmers' discriminatory practices without any effective recourse.[6] This proceeding presents the Commission with the opportunity to better effectuate Congress's intent by modifying and clarifying various aspects of the program access rules as they apply to buying groups and their members.

II. The Commission Should Adopt those Proposed Modifications and Clarifications of its Rules That Will Best Carry Out Congress's Intent With Respect to Buying Groups.

Several cable operators have joined Mediacom in expressing their support for the adoption of several proposals that would help ensure that buying groups are able to stand in the shoes of larger distributors as envisioned by Congress. These proposals include (i) modifying the definition of the term "buying group" so that it encompasses cooperative purchasing entities that assume liability for forwarding member payments to programmers; (ii) expressly prohibiting programmers from refusing to deal with a buying group, or with particular members of a buying group, based on the number of subscribers served by the distributor individually or the group as a whole; (iii) requiring programmers to deal with buying groups on terms that are comparable to those offered individual distributors serving a comparable number of subscribers and to provide buying groups with a schedule of applicable rates based on subscribers served by buying group

[5] *See, e.g.*, 47 U.S.C. § 548(c)(2)(B) (prohibiting discrimination in the prices, terms, and conditions of sale or delivery of programming "among or between cable systems, cable operators, or other multichannel video programming distributors or their agents or buying groups"); 47 C.F.R. § 76.1000(e) (defining the term "multichannel video programming distributor" to include not only cable operators, DBS services, TVRO distributors and SMATV operators, but also "buying groups or agents of all such entities"). *See also* S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 25 (explaining that "legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions"); H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) at 91 ("National and regional programmers affiliated with cable operators are required by the Senate bill to offer their programming to buying groups on terms similar to those offered to cable operators").

[6] *See, e.g.*, Comments of the American Cable Association, MB Docket No. 12-68 (filed December 14, 2012) at 13-14, 32 ("*ACA December 2012 Comments*").

members that elect to participate in an agreement; and (iv) clarifying that when a distributor joins a buying group (or becomes part of a new buying group) the distributor can opt into the buying group's current agreement with a programmer as soon as the distributor's existing agreement with that programmer expires. Mediacom restates its support for the adoption of each of these proposals.[7]

These steps, while modest, will produce clear public interest benefits and are consistent with both the letter and spirit of Section 628. Yet, for some programmers, even these actions represent a step too far. According to Comcast Corporation/NBCUniversal Media, LLC (collectively "Comcast") and AMC Networks, Inc. ("AMC"), there is nothing wrong with today's video programming marketplace and there is no need or justification for any changes in the Commission's rules. The Commission should view the programmers' arguments in support of the status quo with skepticism, as even a cursory analysis reveals that, when it comes to buying groups, the programmers' goal is to neutralize rather than facilitate the effectiveness of such organizations.

First, both AMC and Comcast oppose the Commission's proposal to amend the definition of the term "buying group" so that it encompasses an alternative liability option under which the buying group agrees to assume liability to forward to the appropriate programmer all payments due and received from its members under a master agreement.[8] As ACA explained in its

[7] As Mediacom noted in its initial comments, instead of relying on a "safe harbor" rule to guarantee the right of distributors below a certain size to participate in a buying group's master agreement, the Commission simply should clarify that all distributors have a presumptive right to participate in a buying group regardless of size. *Mediacom December 2012 Comments* at 7-10. Cox takes a similar position in its comments. *Cox Comments* at 7-8. On the other hand, Mediacom disagrees with Cox's support (even as conditioned in its comments) for the Commission's proposal to apply a "reasonableness" test to a buying group's membership decisions. *Id.* at 14. Like ACA, Mediacom believes that membership decisions are best left to resolution under the antitrust laws. *Mediacom December 2012 Comments* at 7-10; *ACA December 2012 Comments* at 7-11.

[8] Comments of the AMC Networks, Inc., MB Docket No. 12-68 (filed December 14, 2012) at 4 ("*AMC Comments*"); Comments of Comcast Corp. and NBCUniversal Media, LLC, MB Docket No. 12-68 (filed December 14, 2012) at 18 ("*Comcast Comments*").

comments, this approach to liability is used by the National Cable Telecommunications Cooperative, Inc. ("NCTC"), the nation's largest video programming buying group.[9] Mediacom is unaware of any evidence that this approach has harmed programmers and, in fact, both AMC and Comcast have acknowledged that they enter into agreements with NCTC today.[10] In short, AMC and Comcast – who still will have the right under Section 628 to impose "reasonable requirements" for creditworthiness, offering of service, financial stability, and character[11] – have no legitimate basis for objecting to the proposed revision of the buying group definition. Rather, they simply want to preserve the current arrangement under which an MVPD that elects to purchase programming through an organization such as NCTC must give up its protection against refusals to deal and other forms of discriminatory treatment.

Second, Comcast and AMC offer several reasons why they believe the Commission should not impose any restrictions on a programmers' ability to refuse to deal with a particular buying group member. However, none of the programmers' arguments can overcome the basic fact that, under Section 628, programmers are required to treat buying groups and their members no differently than they treat individual MVPDs. Thus, if it is unlawful for a programmer to refuse to deal with a particular MVPD, or to discriminate against that MVPD in the prices, terms, and conditions of service, it also is unlawful for a programmer to engage in such behavior vis-à-vis a buying group or an MVPD that elects to purchase programming through a buying group.

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[9] Comments of the American Cable Association, MB Docket No. 12-68 (filed June 22, 2012) at 18 ("*ACA June 2012 Comments*").

[10] *AMC Comments* at 4; Press Release, NBCUniversal, NBCUniversal Signs Multi-Year Carriage Deal with NCTC (Dec. 31, 2012).

[11] 47 U.S.C. § 548(c)(2)(B)(i).

Thus, Comcast's argument that no evidence has been put forward to show any need to "expand" the program access rules is misplaced.[12] Section 628 already provides buying group members with the same protections as apply to MVPDs that negotiate individually for programming. The application of the program access rules to buying groups and their members is not an "expansion" of current law, it is current law, and there is no need to justify the proposed clarifications with specific evidence of "marketplace harms."[13]

Comcast also is mistaken in suggesting that it would be wrong for the Commission to require that programmers deal through a buying group with those MVPDs that, in the programmer's opinion, "are perfectly capable of negotiating contracts with programmers on their own."[14] There is no small irony in Comcast, which as a cable operator brings over 20 million subscribers to the table when it negotiates programming deals, expressing concern about the leverage that smaller operators might accumulate by joining together in a buying group. But leaving that irony aside, there is nothing in Section 628 or its legislative history that supports the conclusion that Congress intended to limit the protections that the program access rules afford to buying groups and their members to apply only to MVPDs that are incapable of negotiating on their own.

AMC's arguments suffer from the same flaws as Comcast's. For instance, AMC claims that there are "legitimate pro-competitive reasons for seeking to enter into an individualized, bilateral agreement with an MVPD" rather than negotiate through a buying group agreement.[15] The problem with this argument is that Congress has determined that a programmer's

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[12] *Comcast Comments* at 17.

[13] *Id.*

[14] *Comcast Comments* at 23.

[15] *AMC Comments* at 8.

discrimination against or refusal to deal with an MVPD can be "legitimate" only if it falls within one of the specific exceptions to the program access rules codified in Section 628(c)(2)(B).[16] And none of those exceptions gives programmers the right to refuse to deal with an MVPD as a member of a buying group based on the MVPD's size or for the purpose of forcing that MVPD to negotiate with the programmer on an "individualized, bilateral" basis.[17]

AMC also claims that protecting buying groups and their members against refusals to deal or other forms of discrimination by programmers "will be especially harmful to consumers and could raise serious antitrust concerns" and will "contravene" programmers' First Amendment rights by forcing them to "speak through mediums not of their choosing."[18] The assertion that buying groups pose a threat competition and consumer welfare is flatly contradicted by the record, which establishes that buying groups generally enhance competition and benefit consumers.[19] And AMC's First Amendment argument ignores the fact that the program access rules have withstood constitutional challenge and there is nothing in AMC's argument to suggest that the application of those rules to buying group members warrants a different analysis or conclusion.[20] The "burden" of being required to negotiate with an MVPD through a buying group is certainly no greater than the burden of being required to negotiate with that MVPD individually.[21]

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[16] 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b).

[17] *AMC Comments* at 8.

[18] *Id.* at 9, 10.

[19] *Mediacom December 2012 Comments* at 2, 8; *Cox Comments* at ii.

[20] *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996).

[21] AMC also appears to be concerned that if programmers cannot refuse to deal with buying group members, MVPDs will be able to abandon existing contracts for more favorable buying group deals. However, Mediacom and others have simply asked the Commission to clarify that if an MVPD that previously negotiated a carriage agreement directly with a programmer elects to join a new or existing buying group that has a master agreement with the same programmer, the MVPD can opt into the group's master agreement once the MVPD's individually negotiated agreement expires. *Mediacom December 2012 Comments* at 13. *See also Cox Comments* at 13.

Third, Comcast and AMC do not just oppose giving buying groups and their members the same protections against discrimination and refusals to deal as individual MVPDs; they also oppose giving buying groups and their members the means to enforce those protections. In particular, Comcast and AMC contend that programmers should not be required to treat buying groups as being similarly situated to individual MVPDs with a comparable number of subscribers.[22] They also oppose being required to publish a rate schedule that would allow buying group members to see the range of rates applicable to different subscribership thresholds under the buying group's master agreement.[23]

AMC and Comcast argue that treating individual MVPDs as similarly situated to buying groups whose members serve a comparable number of subscribers does not reflect the realities of the marketplace because size is only one factor that goes into an agreement between a distributor and a programmer.[24] However, in Mediacom's experience, size is far and away the most significant factor in negotiating a program carriage agreement. Everything else runs a distant second. Comcast itself has essentially admitted this, commenting that "[t]he price that any MVPD may receive from a programmer is closely related to the number of subscribers to whom it agrees to deliver the programmer's network."[25] AMC also has acknowledged that "of all the practical unknowns used to determine carriage rates, the number of subscribers that will participate in the agreement is perhaps the easiest input for buying group members to predict."[26] As ACA has pointed out, and as Mediacom has alluded to above, Section 628 identifies other factors that can be weighed in differentiating between distributors, and those other factors can be

[22] *Comcast Comments* at 20; *AMC Comments* at 11.

[23] *Comcast Comments* at 21; *AMC Comments* at 12-13.

[24] *Comcast Comments* at 23; *AMC Comments* at 11-12.

[25] *Comcast Comments* at 20.

[26] *AMC Comments* at 14.

taken into account in negotiations between programmers and buying groups just as they can in negotiations between the programmer and a similarly-sized distributor.[27] But size should be a presumptive indicator of substantial similarity and programmers should be prohibited from ignoring that similarity in order to give a "volume" based discount to an individual MVPD while denying the same price to buying group members.

Finally, AMC and Comcast argue that the proposed rules and clarifications (including the proposal to require the publication of a rate schedule for buying groups) would unfairly subject cable-affiliated programmers to burdens not imposed on other programmers. But the program access rules, at least up until now, have always imposed regulatory obligations on cable-affiliated programmers that are not applied to programmers in general. Thus, it is no more "unfair" to demand that cable-affiliated programmers not refuse to deal or otherwise discriminate against buying groups and their members than it is to demand that they follow the program access rules in their dealings with individual MVPDs. That being said, Mediacom returns to the point it made at the outset of this reply. The programmers are right – it does not make sense to prohibit discriminatory practices that adversely impact competition and consumers only when they are engaged in by one segment of the programming industry. As Mediacom and Cox have urged in this proceeding, the Commission can and should undertake a comprehensive examination of discriminatory and other unfair practices engaged in by programmers – all programmers – not just those affiliated with cable operators.

III. Conclusion.

For the reasons stated herein, the Commission should take the following actions to enhance the effectiveness of its program access rules as applied to buying groups and their

[27] *ACA June 2012 Comments* at 30-31.

members: (i) amend the definition of the term "buying group" so that it encompasses the alternative liability approach successfully utilized by NCTC in its dealings with programmers; (ii) clarify the right of MVPDs to participate in buying group transactions and to enjoy the same level of protection against unreasonable refusals to deal and other forms of discrimination as are accorded individual MVPDs; and (iii) establish a standard of comparability under which buying groups and individual MVPDs with roughly the same number of subscribers are presumed to be substantially similar for purposes of the prohibition against discriminatory prices and require programmers to provide buying groups with a rate schedule pegged to the different volume discount levels that the programmer offers to individual MVPDs. In addition, Mediacom renews its request for the Commission to undertake a comprehensive examination of volume discounting and other practices engaged in by programmers that are adversely impacting competition and consumers.

Respectfully submitted,

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